

No. 15678

**United States
Court of Appeals**
for the Ninth Circuit

KINGMAN WATER COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**

FILED

1957 - 2 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court,
District of Arizona

Civil No. 467 Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY, KINGMAN,
ARIZONA,

Defendant.

COMPLAINT FOR REFUND
OF OVERCHARGES

1. This court has jurisdiction under 28 U.S.C. 1345, in that the United States of America is the plaintiff herein.

2. The Housing Authority of Mohave County was an agency of the County of Mohave authorized to operate housing projects, under lease, for the Federal Government, pursuant to a state statute, to wit, The War and Defense Housing Law, Appx. 5(B) of the 1952 Cumulative Supplement to the Arizona Code, 1939.

3. The defendant is a corporation doing business as a public utility at Kingman, Arizona. By a lease dated July 17, 1944, but effective as of July 1, 1944, the United States of America leased to the Housing Authority of Mohave County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units.

Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services and that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

5. The United States of America entered into a contract with defendant Kingman Water Company for the supplying of water to the said Vista Solar project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 2, 1919, filed on behalf of the defendant by I. I. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

6. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solar housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120

housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3,000 gallons, multiplied by 12. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951. The defendant paid all of said billings except the amounts billed for June and July, 1951, which totaled \$1,011.14.

8. The plaintiff has fully performed all covenants and conditions on its part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiff sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiff herein in the sum of \$14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

Wherefore, the plaintiff prays judgment against the defendant for \$14,813.19, interest upon each overpayment from the date thereof, the costs of this

Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services and that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

5. The United States of America entered into a contract with defendant Kingman Water Company for the supplying of water to the said Vista Solana project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 12, 1919, filed on behalf of the defendant by I. M. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

6. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120

housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3,000 gallons, multiplied by 120. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951. The defendant paid all of said billings except the amounts billed for June and July, 1951, which totaled \$1,011.14.

8. The plaintiff has fully performed all covenants and conditions on its part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiff sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiff herein in the sum of \$14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

Wherefore, the plaintiff prays judgment against the defendant for \$14,813.19, interest upon each overpayment from the date thereof, the costs of this

action, and such other and further relief as may be just and proper.

.....,

JACK D. H. HAYS,

United States Attorney for
the District of Arizona;

/s/ ROBERT O. ROYLSTON,

Assistant U. S. Attorney,
Counsel for Plaintiff.

Date: April 18, 1956.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and for its answer to the complaint on file herein admits, denies and alleges as follows:

I.

Said defendant admits the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of said complaint.

II.

Answering Paragraph 6 of said complaint, said defendant admits that from May 20, 1944, to July, 1951, it delivered water to said housing project through four meters owned and installed by the United States of America, and that the quantities of water so delivered were reported and billed for

each monthly period solely on the basis of the amounts appearing on said meters, and further that defendant made its charges as though there were a separate meter at each of the 120 housing units in the project, as alleged in said complaint. Said defendant admits that in its monthly billings it made the further assumption that each and every one of the 120 units was occupied every month by a water user. Further answering said paragraph, defendant alleges that at the time of the consummation of the agreement between it and plaintiff, it was agreed by and between plaintiff and defendant that because of the unavailability of water meters which had been caused by a shortage of materials during war-time, the plaintiff would furnish meters, and in the event meters were not available for each individual housing unit, water charges would be made on the basis of each individual unit.

III.

Answering Paragraph 7 of said complaint, defendant denies each and every allegation contained therein except the allegation that the defendant paid all of said billings except the amounts billed for June and July, 1951, in the total sum of \$1,011.14, and in that regard, said defendant alleges and admits that plaintiff paid all of the billings except the amounts billed for June and July, 1951, which total \$1,011.14.

IV.

Answering Paragraph 8 of said complaint, defendant denies that the plaintiff had performed all

covenants and conditions on its part under the aforesaid contract in that said plaintiff failed to supply water meters for each individual unit in said housing project.

V.

Answering Paragraph 10 of said complaint, defendant denies the allegations contained therein.

VI.

Further answering said complaint and as a further and separate and distinct defense thereto, said defendant alleges that the amount billed by defendant to plaintiff for water service to the residents of said Vista Solana homes has become an account stated in that for a long period of time after the billing of said accounts, plaintiff accepted said billings and paid the same and is now estopped to assert the incorrectness of said amount.

Wherefore, defendant prays that the complaint of the plaintiff on file herein be dismissed and that the defendant have and recover its costs herein expended.

/s/ BRUCE I. BISHOP,
Attorney for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 12, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 1, 1957

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day. Robert O. Roylston, Esquire, Assistant United States Attorney, is present for the Government. Brice I. Bishop, Esquire, is present for the defendant.

Counsel for the defendant requests leave to amend answer.

It Is Ordered that the record show that in accordance with the motion of counsel for the defendant and, on stipulation of counsel for the plaintiff, the Court now manually amends defendant's answer by interlineation.

Plaintiff's Case

Plaintiff's Exhibit #1, a true and correct copy of the water rates of the Kingman Water Company as of August 12, 1919, from Corporation Commission, is admitted in evidence.

Paul M. Sapp is sworn and examined in the plaintiff's behalf.

Plaintiff's Exhibit #3, copy of letter of July 21, 1951, directed to the Kingman Water Company from the Public Housing Administration is admitted in evidence.

Plaintiff's Exhibit #4, recapitulation, is admitted in evidence.

Counsel for the defendant reads letter dated October 16, 1943, directed to Federal Public Housing Authority from Johannsen and Girard, Phoenix, Arizona, which is part of the Federal Housing Authority file Arizona 2-311, into the record.

Letter dated May 8, 1944, from Carl G. Krook addressed to Federal Public Housing Authority is read into the record.

The following exhibits are admitted in evidence:

Defendant's Exhibit A, Decision #27023-A

Plaintiff's Exhibit #5, Blueprint

Whereupon, the Government rests.

Defendant's Case

Defendant's Exhibit B, Deposition of Ira M. George, is admitted in evidence.

The following witnesses are now sworn and examined in defendant's behalf:

Donald George

Benjamin F. Golding

Defendant's Exhibit C, Paragraph IV, page 3, Rules and Regulations Domestic Water Companies, is admitted in evidence.

Thereupon the defendant rests.

Counsel stipulate that the ruling made by Kingman Water Company herein did not comply with

sub-paragraph (c) of Paragraph IV of Defendant's Exhibit C.

On stipulation of counsel,

Plaintiff's Exhibit #2, Contract, is admitted in evidence.

It Is Ordered that counsel for both sides be allowed ten days to file memoranda setting out their respective positions and that upon the filing of said memoranda the matter will stand submitted.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 25, 1957
(Prescott Division)

Honorable James A. Walsh, United States District Judge, Presiding.

The fact that a governmental agency was defendant public utility company's customer does not render the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer. *City of St. George v. Public Utilities Commission*, 220 P. 720; 73 C. J. S., "Public Utilities," Sec. 41 (b) (3), p. 1087; 94 C. J. S., "Waters," Sec. 275 (c), p. 131. Any agreement between the customer and defendant for water service at a rate different from that filed by defendant with the Arizona Corporation Commission would be void. § 40-367 and 40-374, A. R. S. Any ambiguity in the filed rate, Plaintiff's Exhibit No. 1 in Evidence, must be resolved against defendant, since such rate was pre-

pared by defendant and submitted by defendant to the Corporation Commission for approval. So construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit but, at most, a monthly \$2.50 minimum per meter.

The plaintiff is not estopped to recover the amounts charged and collected by defendant in excess of the lawful rate. *City and County of San Francisco v. U. S.*, 223 F. 2d 737; *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 383.

Counsel for plaintiff will prepare findings of fact, conclusions of law, and judgment in favor of plaintiff and against defendant in conformity with this decision.

[Title of District Court and Cause.]

MINUTE ENTRY OF MARCH 14, 1957

Honorable James A. Walsh, United States District Judge, presiding.

It Is Ordered that the Plaintiff's Proposed Findings of Fact and Conclusions of Law be and they are approved and adopted as the Findings of Fact and Conclusions of Law herein, and

It Is Ordered that the Clerk enter judgment forthwith in favor of the plaintiff and against the defendant for the sum of \$14,813.19 with interest at the rate of 6% upon each overpayment from the date thereof.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for trial before the Court without a jury on February 1, 1957, the plaintiff appearing by Robert O. Royston, Assistant United States Attorney, and the defendant appearing by its attorney Brice I. Bishop, and the Court having considered the pleadings and the evidence herein makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That the above-entitled action was instituted by the plaintiff to recover payments made by the plaintiff to the defendant as a result of the defendant's overcharge for water furnished to the plaintiff;

2. That the Housing Authority of Mohave County was an agency of the County of Mohave authorized to operate housing projects under lease for the federal government pursuant to Appx. 5(B) of the 1952 Cumulative Supplement to the Arizona Code, 1939;

3. That the defendant is a corporation doing business as a public utility at Kingman, Arizona;

4. That by a lease dated July 17, 1944, but effective as of July 1st, 1944, the United States of America leased to the Housing Authority of Mo-

have County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units, the said lease providing, among other things, that the United States of America would be responsible for the negotiation and execution of contracts for water;

5. That the plaintiff entered into a contract with the defendant for the supplying of water to the said Vista Solana project;

6. That the tariff rate of defendant, which was on file with the Corporation Commission, was Tariff No. 1 dated August 12, 1919, a copy of which is Plaintiff's Exhibit 1 herein;

7. That from May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the plaintiff; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of the amounts appearing on said meters; but defendant made its charges as though there were a separate meter at each of the 120 housing units;

8. That as a result of this billing practice, defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951; the plaintiff paid all said billings except those for June and July, 1951, which total \$1,011.14.

Conclusions of Law

1. That this Court has jurisdiction of this cause by virtue of the provisions of 28 U.S.C. 1345;

2. The fact that a governmental agency was the customer of the defendant does not render the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer;

3. Any agreement between plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void;

4. Any ambiguity in the filed rate, plaintiff's Exhibit No. 1, must be resolved against defendant, since such rate was prepared by the defendant and submitted by the defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit;

5. Plaintiff is not estopped to recover the amounts charged and collected by defendant in excess of the lawful rate;

6. Plaintiff was overcharged in the sum of \$15,-824.33, which, after deducting the unpaid portion, leaves a balance overpaid by the plaintiff in the sum of \$14,813.19;

7. Plaintiff is entitled to judgment against the defendant in the sum of \$14,813.19 with interest at the rate of 6% upon each overpayment from the date thereof.

Dated this 14th day of March, 1957.

/s/ JAMES A. WALSH,

United States District Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

CIVIL DOCKET ENTRIES

1957

Mar. 19—Enter judgment in favor of the Plaintiff United States of America and against Defendant Kingman Water Company, Kingman, Arizona, for the sum of \$14,813.19 with interest at the rate of 6% on each overpayment from the date thereof. (Note: Amended by order of May 14, 1957, to provide sum adjudged plaintiff shall bear int. at rate of 6% per annum from Oct. 21, 1952, until paid.)

* * *

May 14—Enter Order that Findings of Fact and Conclusions of Law be amended as to Finding of Fact Number 7 and Conclusion of Law Number 7; enter order that Judgment be amended to provide sum adjudged plaintiff, to wit: \$14,813.19, shall bear int. at rate of 6% per annum from October 21, 1952, until paid; enter order denying Deft's Motion to Dismiss, Motion for a New Trial and Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the Court for an order dismissing the action and vacating the judgment entered herein because the complaint of plaintiff on file herein fails to state a claim against defendant upon which relief can be granted, upon the grounds and for the reason set forth in defendant's memorandum annexed hereto.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Memorandum Supporting Defendant's
Motion to Dismiss

1. Motion to dismiss for failure to state a claim may be made at any time; therefore, the defense of failure to state a claim need not be pleaded in the answer.

2 Moore's Fed. Practice, Sec. 12.07, P. 2241.

McLaughlin vs. Curtis Publishing Co.

(SD NY 1943), 7 FR Serv. 12h.22, Case I.

2. It is a universally recognized rule of law that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal

or that there was no liability to pay in the first instance.

U. S. vs. Edmonston,

181 U.S. 500, 45 L. Ed. 971, 21 S. Ct. 718;

U. S. vs. Wilson,

168 U. S. 273, 42 L. Ed. 464, 18 S. Ct. 85;

Thorn Wire Hedge Co. vs. Washburn and

M. Mfg. Co., 159 U. S. 423, 40 L. Ed. 205,

16 S. Ct. 94;

Little vs. Bowers,

134 U. S. 547, 33 L. Ed. 1016, 10 S. Ct. 620.

3. The only grounds upon which a suit to recover back monies voluntarily paid are: Duress, fraud, mutual mistake, or failure of consideration.

Lamborn vs. Dickinson County,

97 U. S. 181, 24 L. Ed. 926.

4. Where a person pays a demand, having full knowledge of all of the facts which he later asserts render the demand illegal, or otherwise not payable, without any immediate and urgent necessity for making said payment, the payment thereof is voluntary; that is to say, it is voluntary unless compulsory, i.e., made to emancipate the payor from an actual and existing duress.

U. S. vs. New York & C. Mail S. S. Co.,

200 U. S. 488, 50 L. Ed. 569, 26 S. Ct. 327;

Little vs. Bowers, *supra*;

Union P. R. Co. vs. Dodge County,
98 U. S. 541, 25 L. Ed. 196;

Dennehy & Co. vs. McNulta
(CCA 7), 86 F. 825, cert. den. 176 U. S.
683, 44 L. Ed. 638, 20 S. Ct. 1026.

5. The above propositions of law find full application in the case of a public utility.

Swift & Co. vs. Columbia R. Gas & Elec. Co.
(CCA 4), 17 F. 2d 46;

Illinois Glass Co. vs. Chicago Telegraph Co.,
234 Ill. 535, 85 N.E. 200. (See 63 A.L.R.
1349 and cases in note 18, p. 851, 40 Am.
Jur.)

6. Mistake of Law—The trend of modern authority is strongly in favor of the rule that money voluntarily paid under a claim of right, with full knowledge of all of the facts, in absence of fraud, duress, or compulsion, cannot be recovered back merely because the party making payment was, at the time of payment, ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes, of itself, no relief.

U. S. vs. Edmonston, *supra*;

U. S. vs. Wilson, *supra*;

Badeau vs. U. S.,
130 U. S. 439, 32 L. Ed. 997, 9 S. Ct. 579;

Waples vs. U. S.,
110 U. S. 630, 28 L. Ed. 272, 4 S. Ct. 225;

Lamborn vs. Dickinson County,
97 U. S. 181, 24 L. Ed. 926.

7. A mistake of law occurs when a person, natural or artificial, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken inference arising from an imperfect or incorrect exercise of the judgment on facts as they really are. The rule applies fully to contracts of all kinds, and, specifically, contracts with a public utility.

Scott vs. Ford,
45 Ore. 531, 78 P. 742, 80 P. 899;

Illinois Glass Co. vs. Chicago Telegraph Co.,
supra.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant moves the Court to set aside the findings of fact and conclusions of law and the judgment entered herein on the 19th day of March, 1957, and to grant the defendant a new trial on the grounds that:

1. The Court erred in ruling that the fact that a governmental agency was the customer of the defendant did not render the Arizona regulatory statutes inapplicable to the dealings between the defendant and the plaintiff and that the agreement

between the plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission are void;

2. That the judgment is contrary to law in that an agreement between a governmental agency and a public service corporation is binding between the parties irrespective of rates filed with the Arizona Corporation Commission by the utility, and upon the further ground that the complaint on file fails to state a claim upon which relief can be granted.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPPLEMENT TO MOTION FOR NEW TRIAL

Defendant herewith supplements the grounds assigned in its motion for new trial, heretofore filed with the Court, and herewith assigns, as grounds for a new trial in addition to the grounds heretofore assigned, the following grounds:

3. That the judgment is contrary to and not supported by the evidence, and is contrary to law, in

that the agreement in issue in this action was an agreement between a customer and a public service corporation acting in its private capacity, as to which, said agreement is binding upon the parties under the rules applicable to private contracts in general and is free from all regulatory statutes applicable to a public service corporation dealing as a public utility.

4. That the judgment violates the 14th Amendment to the Constitution of the United States, Sec. 1, in that said judgment deprives defendant of its property without due process of law, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

5. That the judgment violates the 14th Amendment to the Constitution of the United States, Sec. 1, in that said judgment denies defendant equal protection of the laws, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

6. That the judgment violates the 5th Amendment to the Constitution of the United States, in that said judgment deprives defendant of its property without due process of law, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

7. That the judgment violates the 5th Amendment to the Constitution of the United States, in that said judgment constitutes a taking of the private property of this defendant without just compensation, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

8. That the judgment violates Article 1, Sec. 10, of the Constitution of the United States in that said judgment impairs the obligation of a valid and binding contract between private parties and subjects this defendant, dealing in a private capacity, to the rules applicable to a public service corporation.

9. That the judgment is contrary to law in that the only grounds upon which money voluntarily paid may be recovered are fraud, duress, mutual mistake of fact or failure of consideration, and in that neither fraud nor mistake were affirmatively pleaded, as required by the Rules of Civil Procedure, nor were the same proved, and in that duress and failure of consideration were not proved but, on the contrary, are negatived by the averments of the complaint of plaintiff on file herein and by the evidence.

Dated this 28th day of March, 1957.

/s/ BRICE I. BISHOP,

Attorney for Defendant.

Memorandum of Authorities

14th Amendment to the Constitution of the United States, Sec. 1.

5th Amendment to the Constitution of the United States, Sec. 1.

Art. 1, Sec. 10, Constitution of the United States.

City of Phoenix vs. Kasun,
54 Ariz. 470, 97 P. 2d 210, 212.

Lamborn vs. Dickinson County,
97 U. S. 181, 24 L. Ed. 926.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1957.

[Title of District Court and Cause.]

MOTION TO AMEND AND SUPPLEMENT
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant moves the Court to amend and supplement its findings of fact and conclusions of law, heretofore filed, in the following particulars:

1. Amend finding of fact No. 5 to read as follows:

That the plaintiff entered into a contract with the defendant, Kingman Water Company, for the supplying of water to the said Vista Solana Housing Project, on or about the 1st day of May, 1944, by

which contract, the defendant agreed to deliver water to said Vista Solana Housing Project at the rate of \$2.50 per month per 3,000 gallons for each of the 120 units contained in the Vista Solana Housing Project.

2. Amend finding of fact No. 7 to read as follows:

That from May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana Housing Project through four meters owned and installed by the plaintiff; that the quantities of water so delivered were reported and billed for each monthly period in accordance with the oral contract as set forth in finding of fact No. 5 of these findings.

3. To strike and eliminate findings of fact No. 8 in its entirety.

4. Make the following additional findings of fact:

(a) That each of the individual 120 family units in the Vista Solana Project was not metered with the customary water service meter because of war-time shortages;

(b) That the plaintiff heretofore filed a complaint to recover overcharges with the Arizona Corporation Commission, which proceeding is captioned as follows: "In the Matter of the Complaint of the Public Housing Administration, an agency of the United States of America, against Kingman Water

Company regarding water rates for the Vista Solana Housing Project, No. Arizona-2331, at Kingman, Arizona, Docket No. 10163-E-1129''; that in said proceeding, said Arizona Corporation Commission adjudged and decreed that the contract between the plaintiff and defendant was not a matter of regulation under the provisions of Arizona statutes and within the jurisdiction of the Arizona Corporation Commission.

5. Consistent with the findings of fact as so amended and supplemented, the conclusions of law should be amended to state that the fact that the oral contract was between a governmental agency and the defendant renders the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer and that where public service corporations and governmental agencies enter into contracts, the rates so agreed upon govern and the question of whether said rates are confiscatory or excessive is immaterial and where such parties make a contract, fixing the amounts to be paid for utility services, the utility may not be required to serve for less and that the defendant is entitled to a judgment against the plaintiff, dismissing the complaint of the plaintiff and for the defendant's costs incurred herein.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,

Attorney for Defendant.

Memorandum in Support of Motions

Where a governmental agency makes a contract with a public utility, fixing the amount paid for its service, the utility may not be required to serve for less even if its specified rates are unreasonably high. Likewise, it is well established that courts may not relieve a public utility bound by valid contract to render service for fixed amounts from its obligation to serve at agreed rates, however inadequate they have become or may prove to be.

73 C. J. S., Public Utilities, Sec. 25 (c), P. 1048.

43 Am. Jur., Public Utilities and Services, Sec. 87, P. 630, Sec. 188, P. 697.

City of New York vs. Interborough Rapid Transit Co., 297 N. Y. Supp. 243, affirmed 257 N. Y. 20, 177 N.E. 295.

A municipality generally may, in the absence of any direct action by the state, enter into a contract with a public utility whereby the rates to be charged by the latter are fixed and such contract, as between the parties themselves, is binding.

Salt Lake City vs. Utah Light and Traction Co., 52 Utah 210, 173 P. 556.

3 A.L.R. 738.

9 A.L.R. 1165.

28 A.L.R. 587.

With respect to the provision for interest in the judgment, in view of the nature of the case, interest

should not be allowed to run prior to the date of judgment. In this case, there was a bona fide existence of the dispute over the entire claim of the government and the defendant has in good faith denied liability from the entire claim, rendering it unliquidated, and interest should not be assessed until the sum due plaintiff is liquidated by judgment.

Baker County vs. Huntington,
48 Ore. 593, 89 P. 144.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPPLEMENT TO MOTION TO AMEND
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant herewith supplements the above-entitled motion, heretofore filed with the Court, and herewith moves the Court to amend its findings of fact and conclusions of law upon the following additional grounds and in the following additional particulars:

6. Amend finding of fact No. 3 to read as follows:

That the defendant is a corporation doing business as a public utility at Kingman, Arizona; that, however, in the making and performance of the contract herein in issue, said defendant was not

dealing as a public utility as such but was dealing in a private capacity under private contract to perform what it was not under a duty to perform without said contract.

7. To make the additional following finding of fact:

That the payments made by plaintiff to defendant were made voluntarily by plaintiff, under claim of right by the defendant, and with full knowledge in plaintiff of all of the facts which it now asserts rendered the demand unlawful, and without fraud, duress, mistake or failure of consideration, and under mistake of law as to its liability under said contract.

8. Consistent with the findings of fact as so amended and supplemented, the conclusions of law should be amended to state that defendant was not under a duty to serve upon the terms and conditions under which it had been requested to serve and subsequently agreed to serve and did serve, and that the basis of the right to regulation is the said duty to serve, and that where the duty to serve arises from a contract (and not said duty to serve which is implied even without said contract), said contract is not subject to the regulations of the State of Arizona bearing upon public service corporations but is governed solely by the rules applicable to private contracts in general; that, therefore, the statutes of the State of Arizona bearing upon public service corporations are inapplicable herein and the

contract in issue herein is governed solely by the rules applicable to private contracts in general; that said contract is valid and binding and has been fully performed by both parties.

Said conclusions of law should be further amended to state the fact that, in any event, plaintiff's action was one to recover money paid under a mistake of law and that said money was paid voluntarily under claim of right in full knowledge of all of the facts, and without fraud, duress, mutual mistake of fact or failure of consideration and that by reason thereof, the complaint of plaintiff on file herein fails to state a claim upon which relief can be granted, and the evidence adduced upon trial of the cause failed to prove a claim upon which relief can be granted, but that, on the contrary, the complaint and the evidence affirmatively demonstrate that plaintiff is entitled to no relief.

In accordance with the foregoing findings and conclusions, as amended, the Court should then make its conclusion that defendant is entitled to judgment, that plaintiff's complaint be dismissed, and that defendant have judgment for his costs incurred herein.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, APRIL 8, 1957

Honorable James A. Walsh, United States District Judge, Presiding.

Robert O. Royston, Esquire, Assistant United States Attorney, is present for the Government. Brice I. Bishop, Esquire, is present for the defendant.

Defendant's Motion to Dismiss, Defendant's Motion to Amend and Supplement Findings of Fact and Conclusions of Law, Defendant's Motion for a New Trial; Supplement to Defendant's Motion for a New Trial and Supplement to Defendant's Motion to Amend Findings of Fact and Conclusions of Law come on for hearing this day. Said motions are duly argued by respective counsel, and

It Is Ordered that said motions are submitted and taken under advisement, and

It Is Ordered that the defendant is allowed ten days within which to file a memorandum in support of said motions; counsel for the plaintiff is allowed ten days within which to file an answering memorandum and the defendant is allowed five days thereafter within which to file a reply.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, MAY 14, 1957

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the Findings of Fact and Conclusions of Law made and filed herein on March 14, 1957, are amended as follows:

Findings of Fact Number 7 is amended to read: "7. That from May 20, 1944, to July, 1951, the defendant, in its capacity as a public utility, delivered water to the said Vista Solana housing project through four meters owned and installed by the plaintiff; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of the amounts appearing on said meters; but defendant made its charges as though they were a separate meter at each of the 120 housing units;"

Conclusion of Law Number 7 is amended to read: "7. Plaintiff is entitled to judgment against the defendant in the sum of \$14,813.19, with interest at the rate of 6% from October 21, 1952, until paid."

It is ordered further that the judgment heretofore entered herein is amended to provide that the sum adjudged to plaintiff, to wit, \$14,813.19, shall bear interest at the rate of 6% per annum from October 21, 1952, until paid.

It is ordered further that defendant's Motion to Dismiss, Motion for a New Trial, and Motion to Amend and Supplement Findings of Fact and Conclusions of Law are, and each of them is, denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Kingman Water Company, Kingman, Arizona, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 19th day of March, 1957, and from said final judgment as amended by order entered on the 14th day of May, 1957.

Dated: July 12, 1957.

BRICE I. BISHOP, and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant.

[Endorsed]: Filed July 12, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Appellant, Kingman Water Company, Kingman, Arizona, deposits herewith with the Clerk of the District Court for the District of Arizona, the sum of Two Hundred Fifty Dollars (\$250.00) in cash as and for its bond for costs on appeal in the appeal

in the above-entitled and numbered matter from the above-entitled Court to the United States Court of Appeals for the Ninth Circuit.

Dated: July 12th, 1957.

BRICE I. BISHOP, and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant.

[Endorsed]: Filed July 12, 1957.

In the United States District Court
for the District of Arizona

Civil No. 467—Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY, Kingman, Ari-
zona,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

ROBERT O. ROYLSTON,
Assistant United States Attorney,
For the Plaintiff.

BRICE I. BISHOP,
For the Defendant.

The Above-Entitled Matter came up for trial on the 1st day of February, 1957, at the hour of 10:00 o'clock a.m. at Prescott, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

The Clerk: United States of America, Plaintiff, versus Kingman Water Company, Kingman, Arizona, Defendant, No. Civil 467.

Mr. Roylston: The Government is ready, your Honor.

Mr. Bishop: Ready for the defendant.

The Court: You may proceed.

Mr. Bishop: Your Honor, prior to proceeding I would like to ask leave to make a trial amendment at this time by interlineation in the Answer. And I would direct the Court and counsel's attention to the Answer, in paragraph two, line 24, beginning with the sentence at the end of line 24 where it says: "Said defendant denies that in its monthly billing it made the further assumption that each and every one of the 120 units was occupied every month by a water user."

I would like to amend that—continuing on, it reads: "And in that regard alleges that the monthly billings were made for each of the housing units occupied at the date of the billing."

I would like to amend by interlineation, by having it read: "Said defendant admits that in its monthly billings it made the further assumption that each and every one of the 120 units was occupied every month by a water user." And then strike out the balance of the sentence that reads: "In that

regard," and so on, on to the end, the word, "billings," on line 29. [2*]

The Court: Any objection to that?

Mr. Royston: No objection, your Honor.

Mr. Bishop: There is one other matter, if your Honor pleases, on line 30 there is a dictatorial or typographical error in that the line reads: "Alleges at the time of the consumption of the lease agreement made between it and the plaintiff." The word "lease" should be stricken. I would ask leave to have that portion amended by striking the word "lease."

Mr. Royston: No objection.

The Court: The record may show at this time the Court is manually amending the answer by interlineation in accordance with the motion of the defendant and on stipulation of counsel.

All right, Mr. Royston.

Mr. Royston: If it please the Court, it might save some time if I make a brief opening statement.

The Court: Very well.

Mr. Royston: In this action we are actually agreed on most of the facts involved, but I want to briefly cover the background to show just what the positions are of the respective parties here.

When this housing area was first under contemplation before it was actually constructed, the Public Housing Administration intended to enter into an agreement with the Kingman Water Company, a written agreement for supplying of water

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to the [3] housing project. And at that time back in late '43 negotiations were begun between the Public Housing Administration and the Kingman Water Company. A contract was drawn up by the Public Housing Administration and sent to the Kingman Water Company, but for reasons which we don't exactly know right now, that contract was never signed. We intend to offer that contract into evidence, but it was never signed, so actually that written agreement was never consummated. At that time there were certain water rates which were registered with the Corporation Commission on file there, and it is the Government's contention in this action that since this written agreement was never entered into that the water rates which must be applied to the quantities of water used there at the Housing Administration must be in accordance with that rate that was on file with the Corporation Commission.

Now, the defendant—and I don't want to assume anything which they are not contending—but it is my understanding the defendant takes the position that when this written contract was not entered into that there was some discussion at that time between the officials of the Kingman Water Company and the Public Housing officials at Kingman, relative to these rate charges; and it was agreed or at least was the understanding between the men at that time that the water bills would be computed on the basis of the number of units as if water was being furnished to each individual unit at the [4] Housing Authority. There were 120 units there. So Kingman

Water Company, in preparing its monthly bills, billed it as if each unit was being supplied with water separately. The units were not metered separately and the defendant's contention is the reason the units were not metered separately is because of the unavailability of meters at that time, and the Government officials agreed at a date when they might become available to install separate meters. It is the contention of the Government in that respect that the water was actually furnished through four main meters and distributed to each individual unit, and there was no meter between this main meter and the units themselves. So we don't know exactly how much water each unit used, but we do know the amount that went through the main. It is the Government's contention that the billings should be made as if they were receiving water at this one location and it should be computed on the basis as if there was a single unit rather than 120 separate units. I don't know if I make that clear.

The Court: I understand you. I get your picture, if that is an accurate contention of the defense.

Mr. Royston: If I am in error on this I am sure Mr. Bishop will correct it. I believe as far as the figures are concerned that there is no disagreement between us in regard to the computations. In other words, if the contention of the Government in the way the bill should have been prepared [5] is right, then the figure we allege in our complaint is the correct figure that the Government overpaid. If the way the defendant computed the monthly billings is right, then the defendant has been paid the

amount they were entitled to, with the exception of the last two months. As set out in the complaint, there were two months they weren't paid for, which amounted to a little over a thousand dollars. In other words, we are not in dispute on the figures, we are in dispute on the method of computation which has been used in arriving at the figures. I intend to put on one witness to give a little bit of the background.

The Court: Do you have this Tariff No. 1 that you refer to in your complaint? You didn't attach it.

Mr. Royston: Didn't I attach it? I thought it was attached to that. I am sure I have some copies of it. Maybe I should have this marked as an exhibit.

The Court: Is there any objection to it, Mr. Bishop?

Mr. Bishop: I have no objection.

The Court: It will be received as Plaintiff's No. 1 in evidence.

(Plaintiff's Exhibit No. 1 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 1

State of Arizona

Arizona Corporation Commission

To All to Whom these Presents shall Come, Greeting:

I, Mel D. Michael, Secretary of the Arizona Corporation Commission, Do Hereby Certify That this is a true and correct copy of the schedule of water rates of Kingman Water Company as of date August 12, 1919, as said rate schedule appears in the records of the Commission.

In Witness Whereof, I Have Hereunto Set My Hand and Affixed the Official Seal of the Arizona Corporation Commission, at the Capitol, in the City of Phoenix, This 27th day of May, 1949 A.D.

[Seal] By /s/ MEL D. MICHAEL,
Secretary.

Water Rates of

Name: Kingman Water Company.

Address: Kingman, Arizona.

Filed by: I. M. George.

Date: August 12, 1919.

(For details of this classification see text of accounting order, Page 5.)

1.-b. Commercial—Meter Rates:

All Connections Metered. We Require \$5.00 Deposit

\$2.50 Minimum Rate of 3,000 Gallons

3,001 to 50,000 gals.	\$.50 per Thousand
50,000 to 75,000 gals.45 per Thousand
75,000 to 100,000 gals.40 per Thousand
100,000 to 250,000 gals.35 per Thousand
250,000 to Up gals.30 per Thousand

(Fill in nothing below this line.)

File No. 105.

Authority:

Date Effective:

Cancelled:

Supplement to:

Classification:

Transferred to:

Cancelling:

Tariff No. 1.

Admitted in evidence February 1, 1957.

PAUL M. SAPP

called as a witness herein, having been first duly sworn, testified as follows: [6]

Direct Examination

By Mr. Roylston:

Q. Your name is Paul M. Sapp, and what is your employment, Mr. Sapp?

A. I am the utilities officer in the San Fran-

(Testimony of Paul M. Sapp.)

cisco Regional Office of the Public Housing Administration.

Q. How long have you been in the San Francisco Regional Office, Mr. Sapp?

A. Approximately eleven years.

Q. Have you had occasion to work on this matter between the Public Housing Administration and the charges of the Kingman Water Company, between June of 1944 up to and including July of 1951?

A. I have.

Q. Do you have the files of the Public Housing Administration in connection with this matter with you?

A. Yes; I do.

Q. Will you look in the files and see if you can find a copy of the first contract which was offered to the Kingman Water Company?

A. Yes; I have that in my records.

Mr. Royston: Could this be marked for identification, please?

(Plaintiff's Exhibit 2 marked for identification.)

Q. (By Mr. Royston): Referring to this Plaintiff's [7] Exhibit 2 for identification, this is a copy of an agreement which was sent to the Kingman Water Company, is that correct?

A. That is correct.

Q. This comes from the Public Housing Administration files which are kept in connection with this matter, is that right?

A. That is right.

(Testimony of Paul M. Sapp.)

Mr. Royston: I will offer 2 for identification into evidence.

Mr. Bishop: May I ask a question on voir dire?

The Court: Surely.

Q. (By Mr. Bishop): Mr. Sapp, with respect to this contract, do your records show at what time it was mailed to the Kingman Water Company?

A. Yes, sir.

Q. Can you tell us that day?

A. It was mailed by letter of transmittal dated April 20, 1944.

Mr. Bishop: If your Honor please, I don't want to get technical, because I don't think it is necessary in this kind of a matter, but I would like to state that I fail to see the materiality of this agreement. The record, I think, and the admission of the pleadings, shows that service was instituted in June or at least the first of July, 1944, and we are now referring to an agreement that was never executed by either of the parties that was transmitted in August of '44. [8]

The Court: You said April, did you?

Mr. Bishop: April 20th? I thought you said 8/20.

The Court: No; he said April 20th.

Mr. Bishop: I still don't think the agreement or this unexecuted agreement would have any material bearing on the issues in this case.

The Court: I, myself, don't see where it would be of any assistance. It wasn't entered into.

(Testimony of Paul M. Sapp.)

Mr. Roylston: It isn't of too much value. I thought it would be background.

The Court: The objection will be sustained.

Q. (By Mr. Roylston): Now, from the file of the Public Housing Administration no written contract was entered into during this period in question, is that correct, Mr. Sapp?

A. The first written contract was entered into as of July 21st, 1951.

Q. July 21st of '51 was the first written contract? A. That is correct.

Q. Do you have a copy of that contract with you? A. I do.

Mr. Roylston: May this be marked for identification?

(Plaintiff's Exhibit 3 marked for identification.)

Mr. Bishop: I have no objection to that being admitted.

The Court: All right, it may be received as 3 in evidence. [9]

(Plaintiff's Exhibit 3 marked in evidence.)

(Testimony of Paul M. Sapp.)

PLAINTIFF'S EXHIBIT No. 3

Housing and Home Finance Agency
Public Housing Administration
National Housing Agency
Federal Public Housing Authority

San Francisco Field Office
1360 Mission Street
San Francisco 3, California

July 21, 1951.

Water Contract No. (Ariz.-2331-SF)m-1,
Project No. Ariz-2331.

Kingman Water Company,
Kingman, Arizona.

Gentlemen:

The United States of America, Public Housing Administration (PHA) or any successor to its powers, functions, and duties, by the undersigned, offers to take and pay for water furnished by Kingman Water Company (Utility) to meet the requirements of occupants of Vista Solana Housing Project (No. Ariz-2331) consisting of approximately 120 dwelling units (Project), located in the City of Kingman, State of Arizona, subject to the following terms and conditions:

1. Delivery of water under the terms hereof shall commence on July 21, 1951, and shall continue until the Utility is notified by the Public Housing

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):

Administration to discontinue delivery. The rate specified herein shall apply as to all bills rendered after the date hereof.

2. Delivery of water shall be made through metering equipment furnished, installed, and owned by the PHA but operated and maintained by the Utility located at four points on the Project. Meters shall be designated as Nos. 2, 3, 4 and 5. The points of delivery shall be at the outgoing side of such metering equipment.

3. Except as otherwise indicated, the water service to be furnished and payment therefor shall be in accordance with the following Schedule of water rates. The Utility represents that the rates contained in the following Schedule are the lowest applicable rates for service taken by the Project:

Minimum Charges—Rate Schedule (Per Month)

\$10.00 for each 1½ inch meter, total.....	\$30.00
\$12.50 for each 6-2 inch meter, total.....	12.50
	<hr/>
	\$42.50

Minimum charge includes 51,000 gallons of water

Next	47,000 gallons at \$.50 per 1,000 gallons
Next	25,000 gallons at .45 per 1,000 gallons
Next	25,000 gallons at .40 per 1,000 gallons
Next	150,000 gallons at .35 per 1,000 gallons
All over	298,000 gallons at .30 per 1,000 gallons

4. Payments pursuant to the above Schedule shall be made on the basis of totalized monthly meter readings and in accordance with bills sub-

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):

mitted by the Utility to the Housing Authority of Mohave County on or about the 20th day of each month.

No portion of the water furnished hereunder shall be resold except that the PHA may distribute water to the occupants of the Project as an incident of tenancy.

In compliance with Acts of Congress and Executive Orders of the President it is understood: (a) No Member of or Delegate to Congress shall be admitted to any share or part of this contract or to any benefit to arise thereupon, provided this provision shall not extend or be construed to extend to any contract accepted by any incorporated company where it is made for the general benefit of such corporation; (b) there shall be no discrimination by reason of race, creed, color, or national origin against any employee or applicant for employment qualified by training and experience for work in connection with this contract. The Utility shall include the latter provision in all subcontracts for any part of the work under this contract.

If you accept this offer subject to the foregoing terms and conditions, please indicate your acceptance by the signature of an authorized officer of the Utility in the space provided below on the original and two copies, return to the undersigned the original and one copy of this letter and retain the third

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):
copy which is to be considered as an original upon
dispatch of the foregoing.

All rates, schedules, rules, and regulations contained herein shall be subject to approval of the Arizona Corporation Commission.

THE UNITED STATES OF AMERICA PUBLIC HOUSING ADMINISTRATION,

By /s/ E. STANTON FOSTER,
Acting Director, San
Francisco Field Office.

Accepted:

KINGMAN WATER
COMPANY,

By /s/ J. M. GEORGE,
Pres.

This is to certify that I am the Secretary of the Utility to which the above offer is addressed; that I, who accepted this offer and made this contract on behalf of said Utility, was then Sect. of said Utility; that such acceptance was duly signed for and in behalf of said Utility pursuant to authority of its governing body and is within the scope of its corporate powers.

[Seal] /s/ DONALD GEORGE,
Secretary.

Admitted in evidence February 1, 1957.

(Testimony of Paul M. Sapp.)

Q. (By Mr. Royston): Now, Mr. Sapp, based on the Public Housing Authority's interpretation of the application of the rate schedule filed by Kingman Water Company with the Corporation Commission, have you computed the monthly charges as the Public Housing Administration interprets the application of the rate schedule?

A. Yes; I have.

Q. Do you have that with you?

A. Yes; I have that calculation.

Mr. Royston: May that be marked?

(Plaintiff's Exhibit 4 marked for identification.)

Mr. Royston: I will offer this Plaintiff's Exhibit 4. I might state to the Court that these figures are admitted, but I thought the Court in arriving at some decision that this would show more clearly what the Public Housing Authority contends is the proper application of the rate schedule.

Mr. Bishop: No objection.

The Court: It will be received as Plaintiff's 4 in evidence.

(Plaintiff's Exhibit 4 marked in evidence.)

Q. (By Mr. Royston): Mr. Sapp, did you on any occasion, say, prior to June of 1944, were you ever engaged in any discussions with officials of the Kingman Water Company, you, yourself. [10]

A. I was not an employee of the Public Housing Administration at that time.

Mr. Royston: No further questions.

(Testimony of Paul M. Sapp.)

Cross-Examination

By Mr. Bishop:

Q. Mr. Sapp, do you have any records or letters, I mean copies of correspondence in your file that would relate to the negotiations regarding water service for the Vista Solona Project at Kingman, Arizona, other than the letter of transmittal relating to the unsigned contract that you have referred to?

A. I have some correspondence that relates to it. That is a very broad question. I do have.

Q. The correspondence I would refer to, if there is any correspondence in your file other than the letter of transmittal you have referred to, that would relate to the matter of the charges to be applied to the Vista Solona Project when water service was instituted; and I refer to the period from, say, as I understand it, the service started in June of 1944 or July.

A. Actually, I think, in May, Mr. Bishop.

Q. I was wondering if you had any correspondence relating to charges?

A. I have some that relate to charges. [11]

Q. May I examine them, please?

A. They do not specify the charges, nor do they actually refer to the rates themselves. However, they are simply correspondence between the Public Housing Administration and the Housing Authority of the County of Mohave, and between the Water

(Testimony of Paul M. Sapp.)

Company and the Public Housing Administration, requesting information and similar——

Q. Is there any correspondence that referred to water meters?

A. None of this correspondence refers to water meters, with the one exception, that there was a letter dated October 16, 1943, from the engineers who were designing the project to the Public Housing Administration, at that time the Federal Public Housing Authority, setting forth the conditions under which the engineers planned to serve the project. There is that letter on file.

Mr. Bishop: I would like to offer this letter in evidence or have it read in evidence.

Mr. Royston: I have no objection, your Honor.

Mr. Bishop: I think, if your Honor please, it would probably save a lot of confusion if I read this letter into the record, if counsel will agree. In other words, we won't suffer Mr. Sapp's file with documents missing.

The Court: All right.

Mr. Royston: I have no objection. [12]

Mr. Bishop: May I have your file just a minute, sir?

At this time, if your Honor please, I would like to read into the record a letter from the witness' file, which file is captioned: "Arizona-2331, Kingman, Utilities." And the letter is headed, "Johannessen & Girand, 606 Ellis Building, Phoenix, Arizona, October 16, 1943." It is directed to: "Federal Public Housing Authority, 785 Market Street, San

(Testimony of Paul M. Sapp.)

Francisco 3, California. Attention Mr. Allen van Rensselaer," and it has immediately under that: "Re Water Distribution System, Kingman, T. D. U. F. P. H. A. Project No. Ariz. 2331.

"Dear Mr. van Rensselaer: In preparing the tentative layout for the above-captioned project we have encountered a problem which we would like to submit to your priority division for a ruling.

"There is an existing six-inch water main which crosses through the middle of the project site. This main will be used as the source of water for the project. It is possible to connect twelve of the buildings directly to this main without laying any additional parallel main. To do this we will require the installation of three one and one-half inch disc water meters.

"The balance of the buildings, including one fire hydrant, will be served from a long main which will be connected to the existing main and metered with a six-inch by three-inch fire service disc [13] meter.

"The above-described layout eliminates the construction of a main paralleling the existing main and makes an over-all saving of about \$800.00. It has the disadvantage that it will require the installation of three extra one and one-half inch meters.

"Our present directive does not prohibit the use of multiple meters, but we have had considerable difficulty with the W.P. in the past, therefore we are passing this matter to you for your instructions. Will you please advise us of your decision by tele-

(Testimony of Paul M. Sapp.)

graph at the earliest possible moment. Very truly yours. Johannessen & Girand, by James Girand.”

And the letter is dated October 16, 1943.

Mr. Sapp, now, will you examine your file and see if there is any more correspondence relating to meters or rates?

A. There is a letter dated April 13, 1944, from the Federal Public Housing Authority to the Housing Authority of Mojave County, the purport of which is that to date the schedule of rates and conditions of service for water at the project had not been received at the San Francisco office.

Q. Is there anything else in your file?

A. The next letter was dated April 20th, 1944, and transmitted to the draft of the proposed water service contract to the Kingman Water Company, from the Federal Public Housing Authority. A letter dated May 8th, 1944, from Mr. Carl G. Crook, attorney for Kingman Water Company, to the [14] Regional Counsel, Federal Public Housing Authority, San Francisco, relating to this draft of the contract which had been submitted and asking for a Government representative to go over the entire situation with him.

Q. And that letter was dated May 8th, 1944?

A. That is correct.

Mr. Bishop: I think if counsel doesn't object I would like to read this letter.

Mr. Royston: I have no objection.

Mr. Bishop: This letter is a letter dated May 8th, 1944; it is headed: Law office of Carl G. Crook.

(Testimony of Paul M. Sapp.)

P. O. Box 1029, Kingman, Arizona, and dated May 8th, 1944. It is addressed to Mr. John L. Fitzgerald, Regional Counsel, Federal Public Housing Authority, 785 Market Street, San Francisco 5, California; and bears the reference: RX: Legal: RC: Ariz.-2331.

“Dear Sir. Your letter of the 20th Ult. in which you enclose draft of proposed water service contract for housing project Ariz.-2331 Kingman, have been gone over carefully by the Company, and I am asked to state to you that the proposed agreement is not satisfactory in view of the many changes in the field.

“As there are quite a number of points that will require discussion and negotiation we believe it advisable for the Government to send a representative so we can go over the [15] entire situation with him.

“Will you kindly advise us as to when the Government representative can be here? Yours truly.” And it is signed: Carl G. Crook, Attorney for Kingman Water Co.

Mr. Sapp, does your file contain any response to that letter of May 8th? A. No; it does not.

Q. Do you know whether or not Government representatives were sent to Kingman in respect to the water service?

A. Of my own knowledge, I do not.

Q. Do you of your own knowledge know when a complaint was first registered with respect to water charges? A. Yes.

(Testimony of Paul M. Sapp.)

Q. Can you tell me?

A. The first written complaint was dated June 12th, 1951, a letter to the Kingman Water Company from the Housing Authority of Mojave County. I cannot say what oral representations have been made prior to that time; I believe there were some.

Q. You don't know though of your own knowledge whether there were any?

A. I did not participate in them personally.

Q. Then I believe a complaint was filed by the Government before the Corporation Commission of the State of Arizona, is that correct?

A. That is correct. [16]

Q. When was that complaint filed?

A. Submitted to the Arizona Corporation Commission by the Public Housing Administration June 9th, 1952.

Mr. Bishop: May this be marked?

The Court: Is there any objection?

Mr. Royston: No objections.

The Court: It will be received as Defendant's A in evidence.

(Defendant's Exhibit A marked in evidence.)

(Testimony of Paul M. Sapp.)

DEFENDANT'S EXHIBIT A

Jan. 7, 1953.

Before the Arizona Corporation Commission

DECISION No. 27023-A

In the Matter of the

COMPLAINT OF PUBLIC HOUSING ADMINISTRATION, AN AGENCY OF THE UNITED STATES OF AMERICA, AGAINST KINGMAN WATER COMPANY REGARDING WATER RATES FOR THE VISTA SOLANA HOUSING PROJECT, No. ARIZ.-2331, AT KINGMAN, ARIZONA

Docket No. 10163-E-1129

ORDER AND DECISION

By the Commission:

This matter having come on for hearing before the Arizona Corporation Commission on the 21st day of October, 1952, at the Courthouse of Mohave County, in the City of Kingman, State of Arizona, and the Plaintiff having presented evidence in support of its complaint, and the Defendant having appeared by I. M. George, its president, and Carl G. Crook, its attorney, and the Defendant having filed its Motion to Dismiss and both parties having filed memorandum briefs in support of their respective

(Testimony of Paul M. Sapp.)

positions, and it appearing that the complaint of the Plaintiff concerns a question of fact as to whether there was a water contract between the Plaintiff and the Defendant; and, if there was such a contract, whether or not the contract violated the rate schedules of the Defendant, and it further appearing that such matters involve the existence and/or construction of a contract between private litigants and that the Corporation Commission has no jurisdiction to hear and determine such matters,

Now, Therefore, It Is the Order and Decision of This Commission that the complaint of the plaintiff be, and it is hereby dismissed.

By Order of

THE ARIZONA CORPORATION
COMMISSION.

In Witness Whereof, I, E. T. ("Eddie") Williams, Jr., Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed, at the Capitol in the City of Phoenix, this 30th day of December, 1952.

/s/ E. T. "EDDIE" WILLIAMS, JR.,
Secretary.

Admitted in evidence February 1, 1957.

(Testimony of Paul M. Sapp.)

Mr. Bishop: If your Honor please, may the record show that Defendant's Exhibit A in evidence purports to be a decision, No. 27023-A in the matter of the complaint of the Public Housing Administration, an agency of the United States of America, against Kingman Water Company, regarding water rates for the Vista Solona Housing Project, No. Ariz.-2331 at Kingman, Arizona, Docket No. 10163-E-1129, dated December 20, 1952.

The Court: May I see it?

Mr. Bishop: I have no further questions.

Redirect Examination

By Mr. Roylston:

Q. Let me ask you just one or two questions. Do you have a blueprint that shows the layout of the project up there at Kingman? [17]

A. Yes.

Mr. Roylston: Could this be marked?

Mr. Bishop: I have no objection to it.

(Plaintiff's Exhibit 5 marked in evidence.)

Q. (By Mr. Roylston): Mr. Sapp, referring to this 5 in evidence, I see in red pencil No. 5, No. 4, No. 3, No. 2 across the middle of this. Will you tell us what those numbers represent?

A. Those numbers represent the identification numbers of the four water meters connected to the six-inch water main running transversely across the project.

Q. Now, with respect to this blueprint, will you

(Testimony of Paul M. Sapp.)

interpret Defendant's Exhibit A, which was the letter from Johannessen and Girand, will you interpret that letter with regard to this blueprint, the letter that was read into the record a few minutes ago?

A. A setting of the meters as they were eventually set on the project was done in such manner as to conserve materials. At that time we were engaged in war and there were certain restrictions on materials and every effort was made to save pipe. The letter from Johannessen and Girand was for the purpose of obtaining approval for the setting of the meters as they were set, which appeared to Johannessen and Girand to be the most economical method of setting those meters and avoid laying additional pipelines across the project. [18]

Q. Now, the meters referred to in that letter from Johannessen and Girand are these particular four meters which are numbered across here, is that correct? A. That is my understanding.

Q. And additional meters referred to in that letter do not apply to individual unit meters, is that correct? A. No, sir; it could not.

Mr. Bishop: I object to that, if your Honor please, on the ground the letter speaks for itself.

The Court: I don't see how it could possibly be construed to mean individually. There are how many houses?

Mr. Royston: 120.

The Court: It speaks of three meters in one

(Testimony of Paul M. Sapp.)

place and four in another. It couldn't possibly mean the individual meters.

Mr. Royston: That is what I want to get to. I have one further question.

Q. (By Mr. Royston): You have been with the Public Housing Administration for about eleven years, you say? A. Since November, 1945.

Q. And your work is along the line of the utilities such as this, is that correct?

A. Yes. I am the utilities officer and engineer.

Q. Will you tell us what the ordinary and regular practice of the Public Housing Administration is with respect to [19] individual meters in projects such as this one at Kingman?

Mr. Bishop: Objection, if your Honor please. The practice of the Housing Commission in connection with other projects would have no material bearing on the question in issue in this lawsuit, which is established by the answer and by the complaint, and that is the terms of an oral agreement for service until July of 1951.

The Court: We are concerned with what happened in this case.

Mr. Royston: Yes, sir. I thought we were concerned with whether there was to be individual metering in this case.

The Court: The practice wouldn't establish it.

Mr. Royston: If it wouldn't have any bearing on it——

The Court: This might be the exception.

Mr. Royston: All right, sir. I have no further questions.

Mr. Bishop: I have no further questions.

Mr. Royston: The Government rests, your Honor.

(Plaintiff rests.)

Mr. Bishop: If your Honor please, with respect to the defense, I think Mr. Royston has accurately stated it as far as he went. I would like to point out that in my answer I have raised also the question or the further defense of estoppel by reason of delay in asserting this claim and by reason of [20] the billings having been made and paid over a long period of time. And I will develop the legal propositions with respect to that defense at the close of our evidence.

The Court: All right.

Mr. Royston: If it please the Court, it might save some time if the evidence is going to go into the question of delay creating estoppel, I probably should have moved to strike that from the answer already. I don't know whether it would be proper at this time to move to strike the allegations concerning estoppel and save that much time with the evidence, but it is the contention of the Government that estoppel cannot be used to apply against the Government.

The Court: You can argue that at the end of the case. I took it that was what counsel was getting at in his examination of Mr. Sapp.

Mr. Bishop: It was. And I understand the rule that Mr. Royston will assert——

The Court: There are several questions along that line, not only the Government, but you have a question if this rate or tariff does control the service in this case, there can't be any estoppel, because a public utility can't give a different rate or use a different rate, and it is a matter of public policy. Estoppel won't enter into it if this rate is controlling. I don't know whether it is or not.

Mr. Roylston: I am probably raising stuff too quick. [21]

Mr. Bishop: At this time is the deposition of Mr. I. M. George in the file?

The Court: Yes.

Mr. Bishop: If your Honor please, at this time I would like to offer the deposition of Ira M. George into evidence, which deposition was taken at Kingman, Arizona, before L. O. Tucker, a notary public in Mojave County, and at Kingman, 501 East Oak Street, on September 13th, 1956, beginning at 2:00 o'clock p.m. And I was wondering how you would prefer this be done. You haven't had the opportunity to hear this and I was wondering if it would be proper and convenient to read the deposition, omitting the formal part, into the record.

The Court: If there is no objection to it, why not let it be admitted and I will read it at the end of the matter?

Mr. Roylston: No objection.

Mr. Bishop: All right.

(Defendant's Exhibit B marked in evidence.)

Mr. Bishop: At this time I would like to call as a witness Mr. Donald George.

DONALD GEORGE

called as a witness herein, having been first duly sworn, testified as follows: [22]

Direct Examination

By Mr. Bishop:

Q. Mr. George, what is your full name for the record? A. Donald George.

Q. Where do you reside?

A. 149 East Pine Street, Kingman, Arizona.

Q. Did you reside at that address and city in 1944? A. Yes; I did.

Q. What is your business or occupation, Mr. George?

A. Office manager of the Kingman Water Company.

Q. Are you also an officer of the Kingman Water Company? A. Yes, sir.

Q. What office do you hold?

A. Secretary-treasurer.

Q. Directing your attention to the year 1944, who was the managing officer of the Kingman Water Company? A. I was.

Q. Who was the president of Kingman Water Company at that time? A. I. M. George.

Q. Was Mr. I. M. George active in the affairs and management of the business of Kingman Water Company at that time? A. No.

Q. I am referring, Mr. George, to 1944.

A. Oh, yes; he was at that time. [23]

Q. Is he at this time?

(Testimony of Donald George.)

A. No; he isn't at this time.

Q. Did you participate or have anything to do with the negotiations with respect to water service to the Vista Solona Housing Project in Kingman in 1944? A. No.

Q. Who conducted those negotiations on behalf of the Kingman Water Company?

A. I. M. George, president.

Q. Do you know who was present in Kingman as representative of the Federal Housing Agency?

A. George Gibson was the man that was usually there to do all the business with Mr. George. I believe he was an engineer.

Q. Do you know whether Mr. Gibson is, where he is now? A. He is deceased.

Q. In the year 1944 I will ask you if water meters were then available for new services?

A. No; they were very scarce.

Q. And why, Mr. George?

A. On account of the war, material, labor.

Q. With respect to the Vista Solona Project, do you know who supplied the water meters that were used on that project? A. The Government.

Q. And what kind of meters did they supply?

A. It was one six by two and three one and a half to two [24] inch, I believe.

Q. What meters does the Kingman Water Company usually use for residential services?

A. Three-quarter inch, five-eighths by three-quarters.

Q. In 1944 did the Kingman Water Company

(Testimony of Donald George.)

have any three-quarter inch meters available or on hand at that time? A. No.

Q. Mr. George, when did you become the directing manager of the Kingman Water Company? Let me rephrase it. When did you take over the duties of Mr. I. M. George?

A. I would say in 1950-51.

Q. When did you first receive any complaints from the Federal Government or the Mojave County Housing Authority relating to water charges to Vista Solona Project?

A. Either around 1952 or '54. I couldn't say the exact date.

Q. Mr. George, with respect to the meters at the Vista Solona Project, was the Kingman Water Company ever advised by the Federal Housing Agency or the Mojave County Housing Authority as to what units in the Vista Solona Project were served from the meters located on the project?

A. No.

The Court: Did I understand, Mr. George, you read the meters but didn't know where the water——

The Witness: No; I believe the question was supposed [25] to be this way: You didn't know whether there were ten houses, twenty houses or thirty houses full or empty, or whether there were ninety per cent of them full.

The Court: But you did know where the meter went——

(Testimony of Donald George.)

The Witness: We did know where the meters were.

The Court: What houses it went to?

The Witness: Not particularly, no. No; we didn't install them.

Q. (By Mr. Bishop): In other words, you knew where the three——

A. We knew the location of them.

Q. But you did not know what lines or what unit lines came off of which meter? A. No.

Q. Directing your attention to the years 1944 up to July of 1951, Mr. George, did the Kingman Water Company bill other residential services in Kingman, Arizona, on the same basis?

A. Yes.

Q. Now, with respect to services to multi-family units other than the Vista Solona Project, did you have any such services during that period?

A. A few small ones.

Q. Can you give me an example of one?

A. Well, let's see. We could take the Windsor Apartments for one. That is four apartments. [26]

Q. How many meters did the Windsor Apartments contain? A. One meter.

Q. How were the apartment units billed?

Mr. Royston: I object to that as immaterial, if it please the Court.

The Court: The objection is sustained.

Mr. Bishop: I believe that is all.

(Testimony of Donald George.)

Cross-Examination

By Mr. Roylston:

Q. As far as you know, Mr. George, was there any attempt to determine the number of units that were occupied each month prior to the billing by the Kingman Water Company?

A. No; the Water Company didn't.

Q. And they were billed on the basis of 120 units as if each were occupied, is that correct?

A. Yes.

Mr. Roylston: No further questions.

Mr. Bishop: That is all.

BENJAMIN F. GOLDING

called as a witness herein, having been first duly sworn, testified as follows: [27]

Direct Examination

By Mr. Bishop:

Q. Mr. Golding, what is your full name for the record? A. Benjamin Franklin Golding.

Q. Where do you reside?

A. Kingman, Arizona.

Q. What is your occupation?

A. I am retired right now.

Q. Directing your attention to the years from, say, 1942 to 1951, did you reside in Kingman?

A. Yes, sir.

Q. At that time what was your business or occupation?

(Testimony of Benjamin F. Golding.)

A. From about April 1st, 1942, until around May, '46, I was executive secretary of the Mojave County Housing Authority.

Q. With respect to the Vista Solona branch or the Vista Solona Project of the Mojave County Housing Authority, when was that opened?

A. During the month of May, 1944, I believe it was.

Q. What were your duties with respect to that project?

A. I was executive secretary or manager of the project.

Q. And did you have supervision of the rental of the units and the maintenance of the property?

A. I did.

Q. Where was your office located?

A. When they first opened, when we first opened the Vista Solona Project my office was out at the Hualapai Homes out at the air base. [28]

Q. The Hualapai Homes was another project that was sponsored by the same Housing Authority? A. That is correct; the same Agency.

Q. How long were you the resident manager and executive secretary of the Vista Solona Project?

A. Approximately two years.

Q. That would be from——

A. Some time in May, 1944, or from the time it was completed, until around, I believe, the middle or May 15th, 1946, was when I resigned.

Q. During the period that you acted in that ca-

(Testimony of Benjamin F. Golding.)

capacity what was the condition of the occupancy of the units at the Vista Solona Project?

A. Well, for the first year or such a matter they were almost completely filled. Of course tenants were coming and going all the time, but we had a very high percentage of occupancy.

Q. How were the units rented, on what basis?

A. There were three types of units, what we call a no-bedroom, one-bedroom and a two-bedroom unit. And rentals varied according to the size of the unit, and it included electricity and water in the total charge for the rental.

Q. How about furniture?

A. And furniture also, all furnished.

Q. Now, were the 120 units maintained by your office in [29] use regardless of occupancy?

A. Oh, yes; we had a maintenance crew.

Q. And with respect to units that were empty, would water be used from those units by your maintenance crews?

A. Yes. We would use the water from the spigot adjoining all of the units on the shrubbery, trees and different types of shrubbery and lawns.

Q. Now, Mr. Golding, during your term of office as resident manager and executive secretary, was there any difficulty with respect to the water charges of the Kingman Water Company? A. None.

Q. And did you ever make any complaint to the Kingman Water Company with respect to its water charges?

A. No. That was entirely out of my field of op-

(Testimony of Benjamin F. Golding.)

eration, because the units, you see the Mojave County Housing Authority were an operating unit and the projects were completed and turned over to us with all utilities and everything and all we did was maintain the units and take care of the rentals.

Q. Did the Government have a field representative that visited the project during your tenure in office? A. Yes.

Q. Who was it?

A. We had a regular representative, was a man by the name of Bill Elder, he is now deceased.

Q. Do you know from which office he was out of? [30] A. Out of the San Francisco office.

Q. How often did he come to the project while you were in charge?

A. Oh, it varied in periods of time. Sometimes every thirty days or sixty days or ninety days. I think it was principally upon his time allotted at the various projects. We also had auditors periodically.

Q. During those visits did Mr. Elder—did you ever have a conversation with Mr. Elder regarding water charges? A. No, sir.

Q. You were not present, I take it, Mr. Golding, during any negotiation with respect to the water service to be made to the Vista Solona Project?

A. No; I was not.

Mr. Bishop: No further questions.

(Testimony of Benjamin F. Golding.)

Cross-Examination

By Mr. Royston:

Q. You say you weren't present during any negotiations? A. No, sir; I was not.

Q. After the time you took over as the manager, did you have any conversation with either Mr. I. M. George or Mr. Don George, or both, concerning the water charges?

A. There was a period, I believe, it was either 1945—it was quite a long time after we took the project over—that [31] there was something said about services. And up to that time I didn't even know that we weren't receiving water on contract. And Mr. I. M. George had informed me that they hadn't been able to get together with the Federal Housing Authority in San Francisco.

Q. Did you discuss with Mr. George how the water was to be billed? A. No; I did not.

Q. Did you discuss with him whether the water was to be billed on an occupancy basis or unit basis?

A. No; I did not. He told me in an outline the proposition that he had made to the San Francisco office, our San Francisco office, and he said that was the basis under which he was making the billings. But I had no argument with that because it was out of my jurisdiction anyway. I had nothing to do with that.

Q. Did you discuss with Mr. I. M. George and

(Testimony of Benjamin F. Golding.)

Mr. Don George the charges for water would be based on the number of units occupied?

A. No; I don't believe I did. I might have expressed an opinion that would be my idea of the way they should be based, but it didn't coincide with the proposition Mr. I. M. George had made to their engineer in our home office in San Francisco.

Q. Do you recall discussing this matter back on September 26th with Mr. Laird who came to Kingman and talked to you about [32] this matter, September of this past year?

A. I never seen him. He didn't talk to me. Mr. Laird—oh, he is from Prescott, isn't he?

Q. Yes, sir.

A. Yes; I talked to Mr. Laird and he visited my house up there one time. He asked me quite a number of questions and I had to kind of refresh my memory to find out. It had been so far away, long ago that—I told Mr. Laird I believe that I had discussed with either Don George or Mr. I. M. George the matter of meters, or something like that. But I think I also told him that the Housing Authority turned the idea down, I mean the Federal Housing Authority in San Francisco. The local Housing Authority was in favor of installing meters at each unit and passing that charge on to the renter; but San Francisco said nothing doing on that.

Q. Do you recall on September 26th telling Mr. Laird you had had a conversation with Don George

(Testimony of Benjamin F. Golding.)

or I. M. George, or both, and in this conversation it was agreed the charges for water would be based on the number of units occupied?

A. No; I never made any such statement as that. I might have talked to him about my personal opinion of how it should be based, but we had no agreement—I never told Mr. Laird or anybody else we had any agreement, because it wasn't up to me to make an agreement with any utilities firm on charges for services of any type. [33]

Q. As far as you know, you never submitted any lists of the occupied units or anything to the Kingman Water Company? A. No.

Mr. Royston: No further questions.

Mr. Bishop: I have no further questions.

(Witness excused.)

Mr. Bishop: If your Honor please, I had one other thing I would like to put in evidence and I have a little difficulty. What I would like to get into the record would be the provisions of Section IV, subparagraph (d), of the Arizona Corporation Commission Rules and Regulations Concerning Domestic Water Companies, effective January 1, 1950. And I had the Rules and Regulations to offer and I appear to have left them in my office in my hurry to get up here. Perhaps Mr.—

(Document handed to counsel.)

Mr. Bishop: This is a copy of the Rules, it is not certified to. Would you have any objection to this copy being offered in evidence, Bob?

Mr. Royston: Whether it is certified or not, I am not going to make any objection on that basis, but I don't see what you are getting at.

Mr. Bishop: I will be glad to point that out. The provision I am interested in is Section IV, subparagraph (d), of the Rules, effective January 1, 1950, which provide that minimum [34] charges shall apply regardless of whether the residential unit is occupied or unoccupied.

Mr. Royston: No; I have no objection to it going in for that purpose.

The Court: That would be C in evidence.

Mr. Bishop: Yes, your Honor.

(Defendant's Exhibit C marked in evidence.)

The Court: That was paragraph IV (d)?

Mr. Bishop: Paragraph IV (d). That is contained on page 3. With that I will rest, if your Honor please.

Mr. Royston: Rather than put a witness back on we might stipulate that the billing in our case did not comply with subsection c of IV. Will you stipulate to that, Mr. Bishop?

Mr. Bishop: Yes; I will.

Mr. Royston: Did the Court understand that stipulation?

The Court: That the billing made by the Kingman Water Company in this case did not comply with the provisions of subparagraph c of paragraph IV.

Mr. Royston: Yes, sir. And with that stipulation the Government will rest.

Mr. Bishop: I will also stipulate that that provision that Mr. Roylston has just referred to is quite different than the way they arrive at their charges, too.

Mr. Roylston: That is correct. Does the Court wish [35] to hear us?

The Court: Well, I have this difficulty. I haven't read Mr. George's testimony and I imagine that is probably one of the most crucial points in the case; for that reason I was going to suggest instead of arguing, when I haven't read it, that you contemporaneously file a memorandum.

Mr. Bishop: I would be delighted to do that.

The Court: Within ten days. There will be no replies, but each of you within ten days file a brief memorandum stating your respective positions. I am interested particularly in whether or not this tariff governs; if it doesn't govern, why it doesn't. And the matter of estoppel, those other issues that are raised here.

Mr. Roylston: All right.

The Court: I think it is necessary, because I haven't read Mr. George's testimony and I haven't examined some of these other exhibits. It would be kind of difficult to really follow it until I have. If I have the benefit of your memoranda with all of this in front of me I think I can do a better job and probably get it just as fast.

Mr. Roylston: May it please the Court, before we quit completely, let me reoffer that original contract that was never signed, just for the purposes of the record, then if the Court still feels the same about that—

The Court: Is there still an objection to it? [36]

Mr. Bishop: I really don't think there is. What I would like to do—I believe Mr. Sapp read into the record the date of the letter of transmittal and what it said.

Mr. Royston: Yes, sir.

Mr. Bishop: If that is going in I would like to ask, Mr. Sapp, if your file contained any response to that letter of transmittal other than Carl Crook's letter we read into the record?

Mr. Sapp: No; it did not.

Mr. Bishop: Then I have no objection to it going in as an exhibit, if your Honor please.

The Court: That will be Plaintiff's Exhibit 2 in evidence.

(Plaintiff's Exhibit 2 marked in evidence.)

The Court: The matter will stand submitted subject to the filing of the memoranda. [37]

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter I attended the trial in the foregoing entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 37 pages of typewritten matter contain a full, true and

correct transcript of my shorthand notes taken by me as aforesaid.

Witness my hand this 5th day of March, 1957.

/s/ FRED L. BAKER,

Official Court Reporter.

[Endorsed]: Filed March 6, 1957. [38]

DEFENDANT'S EXHIBIT B

In the District Court of the United States
in and for the District of Arizona

No. C-467—Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY,

Defendant.

DEPOSITION OF IRA M. GEORGE

Before L. O. Tucker, Notary Public.

Appearances:

JACK D. H. HAYES, ESQUIRE,

United States Attorney, by

ROBERT O. ROLYSTON, ESQUIRE,

Assistant United States Attorney,

Appearing for the Plaintiff.

BRICE I. BISHOP, ESQUIRE,

Appearing as Counsel for the Defendant.

(Defendant's Exhibit B—(Continued):

Be It Remembered that pursuant to the stipulation herein contained for the taking of a deposition in the above-styled and numbered cause, the deposition of Ira M. George of Kingman, Arizona, is taken before me, L. O. Tucker, a notary public in and for the County of Mojave, State of Arizona, on the 13th day of September, 1956, commencing at the hour of 2:00 o'clock in the afternoon thereof, at 501 East Oak Street, Kingman, Arizona, on behalf of the defendant in a certain cause now pending in the District Court of the United States, in and for the District of Arizona, wherein the United States of America is the plaintiff and the Kingman Water Company is the defendant.

Stipulation

Mr. Bishop: In accordance with our agreement it is hereby stipulated that the deposition of Ira M. George, on behalf of the defendant herein, may be taken at this time before L. O. Tucker, a notary public in and for the County of Mojave, State of Arizona, at 501 East Oak Street in the City of Kingman, Arizona, under the provisions of the federal rules of procedure.

Is that correct?

Mr. Royston: Yes, sir; that is all right.

Mr. Bishop: And we will waive the signature of the witness to his deposition.

Mr. Royston: We will also waive the signature of the witness to his deposition.

(Defendant's Exhibit B—(Continued):

Mr. Bishop: Very well. Will you please swear
Mr. George?

Thereupon,

IRA M. GEORGE

of Kingman, Arizona, a witness in behalf of the
defendant herein, is publicly sworn to tell the truth,
the whole truth and nothing but the truth, and upon
being examined, testifies as follows:

Direct Examination

By Mr. Bishop:

Q. Mr. George, will you please state your full
name for the record? A. Ira M. George.

Q. And your residence?

A. Kingman, Arizona.

Q. And what is your age, Mr. George?

A. Well, it is nearer eighty than it is anything
else.

Q. And what is your occupation?

A. Well, I am the Kingman Water Company.

Q. You are an officer of the Kingman Water
Company?

A. I am an officer of the Kingman Water Com-
pany.

Q. And what position do you hold with that
company, Mr. George? A. President.

Q. And who are the other officers of the King-
man Water Company?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. Stanley George is vice-president of the Kingman Water Company, and Donald George——

Q. Donald George is the active manager and he is an officer of the Kingman Water Company at this time? A. Yes, sir.

Q. Mr. George, directing your attention to the years from 1944 through and including the year of 1951, which is the period of time involved in this litigation, were you the managing officer of the Kingman Water Company during that period of time? A. Yes.

Q. Are you familiar with what is known as the Vista Solano housing project in Kingman, Arizona?

A. Yes; I am.

Q. You were the managing officer of the Kingman Water Company at the time this project was built, were you not? Is that correct?

A. Yes, sir.

Q. And did you—where is that project located, Mr. George? A. The Water Company?

Q. No; the housing project.

A. Oh, the housing project. That is located in the western part of Kingman.

Q. It is on the west side of town, is it not?

A. Yes, sir.

Q. How many units did it have, do you remember? A. Well, I would say it had 125.

Q. It is your present recollection that this housing project had approximately 125 units. Is that right? A. Yes.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. And did you negotiate the terms for water service to that housing project, on behalf of the Kingman Water Company?

A. Well, I presume you would say that I negotiated the terms for the water service to them, yes; but the law has provided the amount we should charge for that service.

Q. By that, you are referring to your rates?

A. Yes.

Q. Those rates were established by the Arizona Corporation Commission? A. Yes.

Q. But in connection with the servicing to this project, did you discuss that with the representative of the housing authority? A. Yes.

Q. Do you recall with whom it was that you negotiated the servicing agreement for that project—that is, who it was that represented the government during your negotiations?

A. Well, now, they had a man from San Francisco and a man from Phoenix, Mr. Gibson, I believe it was—George Gibson.

Q. Then George Gibson was the government man from Phoenix with whom you negotiated.

Do you recall the name of the man who came from San Francisco? A. No; I don't.

Q. Do you recall where the conferences took place regarding the matter?

A. In Judge Krook's office.

Q. That is Judge Carl Krook? A. Yes.

Q. He is a practicing attorney located here in

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Kingman, Arizona? A. Yes, sir.

Q. And he was your attorney at that time?

A. Yes, sir.

Q. His office is located in the old bank building here in Kingman? A. Yes.

Q. Was there anyone else present during your conferences with Mr. Gibson and the man from San Francisco and yourself?

A. I think that is all that were present.

Q. How many conferences regarding this matter did you have?

A. Oh, we must have had three or four.

Q. And all of them were held in Judge Krook's office? A. Yes.

Q. And do you recall approximately when those conferences were held?

A. (There is no response.)

Q. If you don't remember the exact time, just say so. A. I don't remember the exact time.

Q. Did they precede the time of the initiating this water service to the housing project?

A. Yes.

Q. Would you say they were held shortly prior to that time? A. Yes; they were.

Q. So if the water service to this project started approximately May 15, 1944, then would you say that your conferences took place around the first part of May or around about that time?

A. Yes.

Q. Now, during those conferences, did you, on

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

behalf of the Kingman Water Company, tell the government representatives what you would do?

Just answer that yes or no. A. Yes.

Q. What did you tell them you would do?

A. Well, we told them that the rates were established here for us, and we told them what they were and what they were using, the service that everybody else was getting.

Q. Did you tell them that that would be the basis of your charges at that time? A. Yes.

Q. Were the rates to apply to the individual dwelling units? A. Yes; they were.

Q. Then to rephrase what you have testified to, you agreed to furnish each unit in the project on the basis of your then existing public tariff. Is that right? A. That is right.

Q. And were the units to be metered?

A. Well, we were unable to get meters in those days. We were metering everything in Kingman.

Q. Why were meters unavailable at that time?

A. I imagine because it was during war time was the reason.

Q. Was the unavailability of meters discussed during your conferences? A. Oh, yes.

Q. Now, you have testified as to what you told the government representatives the Water Company would do. Did they agree to that?

A. Yes.

Q. And did they tell you during your conferences with them that was acceptable?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. Yes; they must have or we would not have put the service into effect.

Q. Immediately after that did the Kingman Water Company put the service into effect?

A. Yes.

Q. And did you start billing for this service on that basis from May, 1944, on?

A. Yes. They had a certain number of services and we started the service.

Q. Do you recall how many they had at this time? A. I would say 125.

Q. Now, with respect to the meters, do you recall how many meters were placed on the premises at the project?

A. Well, now, we—it would have been necessary for us to have put in about 125. We didn't have them and we couldn't get them, so that was all made known to the boys in charge of their work.

If those meters had been regularly installed it would have been two dollars and a half per meter.

Q. I see.

A. Two dollars and a half per meter per month.

Q. That would be the minimum charge?

A. That would have been the minimum charge.

Q. And that was discussed during these conferences?

A. Yes; that was discussed during these conferences and it was so understood.

Q. Who was to install and maintain those meters? A. We installed everything.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. Who was to maintain them?

A. The government.

Q. And who procured the meters that were installed?

A. Well, I would say we did, most of them—all we could get.

Q. You got the meters that were available?

A. Yes. We put them on the same service as everybody else in the community.

Q. Now, when did you first receive any notification from the government that they were not happy with the charges? Do you recall that?

A. No; I don't.

Q. Was it a short time after you started furnishing water or a long time after?

A. Well, of course, the service was payable every month, and it had been discussed during that time.

Q. What I mean is during the early part of the operation of the housing project did you in fact receive any complaints about the billing, that you recall?

A. Well, we didn't receive much, if any.

Q. Do you know Mr. Ben Golding?

A. Yes.

Q. Mr. Golding was the resident manager of the project, was he not?

A. Yes.

Q. Did you receive any complaints during his administration of the housing project?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. He just made reports of what the conditions were.

Q. I mean with respect to overcharges?

A. Oh, no.

Q. Do you recall when you first heard about a complaint regarding overcharges?

A. Well, it must have been a long time, for the reason that these charges were not any different from those made to anybody else in the community, what they were paying for the service. It was the same service charge.

It was two dollars and a half for a minimum of three thousand gallons per month.

Mr. Bishop: That is all.

Cross-Examination

By Mr. Royston:

Q. Mr. George, when these men from San Francisco and I believe you said Mr. Gibson from Phoenix came here and talked to you, at that time there was a discussion about entering into a written contract, do you recall?

A. I do not recall that but there may have been because in a service of that size we would always make a written contract for the benefit of both sides.

Q. And do you recall whether they brought a written contract with them and for some reason or other it was never signed?

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Do you recall that?

A. No; that I don't understand.

Q. Actually the first written contract you had with the government on this project out here was in 1951. Is that right?

A. Well, I rather believe it was in '52 or '53.

Q. It was along at about that time that the corporation commission was having those hearings on this matter up here at Kingman.

You recall that when the corporation commission sat at Kingman and some government men came before the commission with a complaint for overcharge for the years 1944 to and around 1951. Do you recall that?

A. I don't.

Q. Well, as far as you can remember then, some time in early 1951 or 1952, you did—your company did enter into an agreement concerning these water rates out at this project.

Isn't that right?

A. We were supposed to. I don't remember of it ever being——

Q. I am talking about the one along in 1951 or 1952 that was actually signed, and then as far as I know you operated under that agreement the rest of the time that this housing project was operated.

Do you recall that agreement, Mr. George?

A. Well, I don't know that I do especially that one. But I know when we had a contract with people for service we always tried to complete the agreement.

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

Q. Yes, sir. The point I am trying to get at, Mr. George, is that your company and the government never had a written agreement for the first several years that water was furnished out there.

Isn't that right?

A. That may be about right.

Mr. Bishop: I can stipulate to that if you want it.

Mr. Royston: All right.

Q. During this time that you operated without a written contract, that is the period we have in question, where it was two fifty per month out there?

A. That is right. That is the same payment that other people made.

Q. During this time there was never anything filed with the corporation commission concerning this particular project out there and the rates charged there.

Is that right?

A. That may be right but I don't know why it should be right, because the corporation commission, when they found out there were that many customers in a case they always wanted to know whether there was a contract or agreement.

Q. As far as you know the first thing that was filed with the corporation commission in connection with this housing project, that was in 1951 or 1952. Is that right?

A. I don't remember. As far as I know there

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

was some talk about a proposed written contract that was never signed in 1944, and no contract was entered into until July of 1951.

Mr. Royston: That is the way I had it.

Q. What I am getting at, Mr. George, during this period from 1944 to 1951, as far as you are concerned you were operating under that tariff rate which was filed with the corporation commission back in 1919. Is that right?

A. I don't know what time it was, but I do know that they didn't permit us to carry on any business without having an agreement—without having a written agreement.

Q. In other words, as far as you know you were billing the housing project out there at the same rate of fees as you were billing every other water user in Kingman. Is that right?

A. Well, I don't know as to every other one.

Q. What I am trying to get at, Mr. George, is that your ordinary water user pays two fifty per month?

A. Yes.

Q. And you were charging each unit out there two fifty per month. Is that right?

A. Yes. That was all by agreement.

Q. Then there is a sliding scale for excessive amounts of water used that you follow?

A. Yes.

Q. And you were following that scale and applying it to each of the units out there—or do you recall?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. No; that I don't recall. That is twelve or fifteen years ago.

Q. Yes. Now, were there four meters out there at this project? A. Four meters?

Q. Do you recall how many meters were actually used on that project? Was four the number that were used out there on the project?

A. Those are large meters; those were not the individual meters.

Q. But all of the water that went into the project went through one of four meters. Is that correct? A. (There is no response.)

Q. Let me ask you this: The water that you furnished to the project out there had to go through one of these four meters that were set there. Is that right? A. (There is no response.)

Mr. Royston: If you don't recall, Mr. George, that is all right.

The Witness: No; I don't recall that.

Q. What I am leading up to, Mr. George, is the reason taken for the monthly billing. Do you recall that? A. No; I didn't get this myself.

Q. I see. Now, Mr. George, when the monthly billings were made up, the first thing that you billed for was the two fifty per month per unit?

That is the first thing that you considered in making up the monthly bill, two dollars and a half each month per unit? A. Yes.

Q. And if there were 120 units there and you charged two fifty per month per unit—

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

A. Yes.

Q. ———that would make a base of three hundred dollars. Isn't that right?

A. Whatever that totals.

Q. What I am leading up to, Mr. George, each monthly bill was billed on a total of 120 units rather than on the number of units that were occupied. Is that right?

A. That is right. That was the arrangement made by our men and the government men.

Q. So your office did not consider the fact that, say, fifty of the units would be unoccupied; as far as your billing was concerned, you still billed them for the 120 units?

A. Yes. But there was never anything like that. There might have been 20 units——

Q. What I am trying to get at, Mr. George, is that you billed as if you were furnishing water to 120 units of the project, and you billed for that number whether they were occupied or unoccupied. Isn't that right?

A. We billed them according to the agreement that was entered into with the—with your local representatives.

Q. Was that the agreement, that you charged two fifty per month per unit whether it was occupied or unoccupied?

A. I imagine it was, because I don't know why it should be different.

Q. Mr. George, this oral agreement that you en-

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

tered into with the man from San Francisco and Mr. Gibson, do you know why that was never written down?

A. No; I don't. I have an idea the attorney would have that record.

Q. I just thought you might remember some particular reason?

A. No; that is ten or twelve years ago.

Q. Yes, sir. Do you recall, Mr. George, whether there was any agreement about placing separate meters in the future, with these men, with these men whom you discussed the contract with?

A. Yes.

Q. Was it——

A. If either one of us were able to get them we were to put them in.

Q. That is, a separate meter for each unit of the project? A. Yes.

Q. So far as you recall, was that project supplied with separate meters? A. No.

Q. It operated through these same large meters you mentioned?

A. Yes—wait a minute. Those large meters came through those service pipes, which was four-inch pipe that brought the service—that brought the water in from the wells. They are the only ones—that is, the water that went into those big meters.

Q. During the time that that project was operated out there there never was individual meters put in on that project?

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

A. There may have been a few but not very many, because we couldn't get them.

Q. Yes, sir. These men who are the officers of the corporation, other than yourself, are they your sons? A. The Kingman Water Company?

Q. Yes, sir. A. Yes; they were.

Q. Were any of those sons present during any of these conferences?

A. They negotiated most of them.

Q. And these representatives from San Francisco and Mr. Gibson, did they have conferences with your sons concerning the water rates at the housing project out there?

A. I presume one would go in the office and ask who these men were and what service they got.

Q. Did this Mr. Golding and you ever discuss the water rates out there, or was your only discussion with these men from San Francisco and Phoenix?

A. Mr. Golding—he was in charge. He very often would come in and tell us about some condition that was wrong, and our man would go out with him.

Q. I mean the charge you were making for the water, you never had any discussion with him about that?

A. We never tried to make it any different from what anybody paid here in Kingman.

Q. Your conferences were with the men from

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

San Francisco and Mr. Gibson from Phoenix; this whole matter was settled as to your charge?

A. As far as I know, it was, yes.

Q. And Mr. Golding came in sometime after that. Is that right?

A. Yes. He became manager of the operation, I think.

Q. Yes, sir. Mr. George, I have a copy of the transcript of a hearing that was held before the corporation commission that was held up here in Kingman in '52.

Now, according to your testimony which you gave at that time you testified that you furnished—that you charged only on the basis of the number of occupied units at this housing project.

When you made that statement were you mistaken at that time?

First, do you recall of stating it in that way at that hearing? A. (There is no response.)

Q. The way they took down your testimony at that time, you stated that you billed at the rate of two fifty per month per occupied unit rather than for 120 units.

Today you have stated that you billed for two fifty per unit per month whether the units were occupied or unoccupied.

Do you remember of testifying in that way before the corporation commission in 1952?

A. In 1952?

Q. Yes, sir.

A. No, I can't.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. Well, if you did testify in that way when you made that statement, you were mistaken at that time. Is that right?

A. Yes. But I don't think I made it.

Q. But the way you recollect it now there never was any allowance made for unoccupied units?

A. No.

Mr. Royston: I believe that covers everything I wanted to ask you, Mr. George.

Do you have anything further, Mr. Bishop?

Mr. Bishop: No, I have nothing further.

Certificate of Notary

Be It Known that I, L. O. Tucker, took the foregoing deposition pursuant to the stipulation herein contained, at the time and place stated in the caption hereto;

That I was then and there a notary public in and for the County of Mohave, State of Arizona; that by virtue thereof I was authorized to administer an oath; that the witness, Ira M. George, before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth;

That the testimony given by the witness was reduced to writing by me, and that the signature of the witness thereto is waived by counsel in their stipulation herein.

I further certify that I am not of counsel nor attorney for either or any of the parties to said

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

action or otherwise interested in the event thereof;
and that I am not related to either or any of the
parties to said cause.

In Witness Hereof I have hereunto subscribed
my name and affixed my seal of office this 6th day
of October, 1956.

[Seal] /s/ L. O. TUCKER,
Notary Public.

My commission expires January 5, 1957.

Admitted in evidence February 1, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States
District Court for the District of Arizona, do hereby
certify that I am the custodian of the records and
files of said Court, including the records and files in
the case of United States of America, Plaintiff,
versus Kingman Water Company, Kingman, Ari-
zona, Defendant, numbered Civ-467 Prescott, on the
docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copy of civil docket entries of judgment and amendment thereto is a true and correct copy of the original thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Plaintiff's Complaint.
2. Defendant's Answer.
3. Reporter's Transcript.
4. Deposition of I. M. George (Defendant's Exhibit B).
5. Minute entry of February 1, 1957 (proceedings of trial).
6. Minute entry of February 25, 1957 (memorandum decision).
7. Minute entry of March 14, 1957 (order directing entry of judgment).
8. Findings of Fact and Conclusions of Law.
9. Civil Docket Entries of March 19 and May 14, 1957 (Clerk's Notation of Entry of Judgment in Civil Docket).
10. Defendant's Motion to Dismiss.
11. Defendant's Motion for New Trial.
12. Defendant's Supplement to Motion for New Trial.

13. Defendant's Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

14. Defendant's Supplement to Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

15. Minute entry of April 8, 1957 (hearing on motions after judgment).

16. Minute entry of May 14, 1957 (order amending findings and judgment and denying motions).

17. Notice of Appeal.

18. Bond for Costs on Appeal.

19. Designation.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Plaintiff's exhibits 1, 2, 3, 4 and 5, in evidence.

Defendant's exhibits A, B and C, in evidence (exhibit B is same document as item No. 4 of this certificate).

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$5.20 and that said sum has been paid by counsel for appellant.

Witness my hand and the seal of said Court this 14th day of August, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15678. United States Court of Appeals for the Ninth Circuit. Kingman Water Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed August 16, 1957.

Docketed: August 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15678

KINGMAN WATER COMPANY, Kingman,
Arizona,

Appellant,

vs.

UNITED STATES OF AMERICA, Housing Au-
thority of Mohave County, Arizona,

Appellee.

APPELLANT'S STATEMENT OF POINTS
UPON WHICH IT INTENDS TO RELY

Pursuant to Rule 17(6), Rules of the United States Court of Appeals for the Ninth Circuit, appellant, Kingman Water Company, files herewith its Statement of the points upon which it intends to rely on said appeal as follows, to wit:

1. The defendant, Kingman Water Company, in the performance of the services rendered to plaintiff, United States of America, was acting in a private capacity and therefore free from all regulations of the State of Arizona pertaining to public service corporations and all regulations promulgated by the Arizona Corporation Commission and tariff rates on file with the Arizona Corporation Commission. Therefore, the Court erred in making its Findings of Fact Nos. 3 and 7, to the effect that the capacity in which defendant performed said services was a

public utility, and in making its Conclusion of Law No. 3 that any agreement between plaintiff and defendant for water service at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void, it appearing that under Arizona law, a public utility may also have private activities and that when a public utility acts in a private capacity, its conduct is governed only by rules applicable to private contracts in general and not by rules applicable to public utilities in the performance of their public duties. The factual premise upon which defendant's capacity is based is that a public utility may lawfully refuse to serve a multiple unit dwelling through master meters, and defendant did refuse to serve through master meters except upon the meeting of certain conditions. Therefore, what defendant did was done pursuant to its contract with plaintiff and not pursuant to a duty which it was required to perform as a public utility, and as such, these activities were not at all governed by any of the regulatory statutes of the State of Arizona or by its tariff rate on file with the Arizona Corporation Commission.

2. There was not, as a matter of fact or as a matter of law, any variance between the filed rate and the rate actually charged by defendant, in that the contract between the parties was actually a device employed by them to conform the charged rates to the filed rates, with the result that there was not any variance whatever. Therefore, the Court erred in making its Finding of Fact No. 8 and its Conclu-

sion of Law No. 6, to the effect that plaintiff was overcharged by the defendant, and the Court further erred in making its Conclusion of Law No. 4, to the effect that the rate on file did not permit the charge of a monthly minimum per residence unit. The factual premise upon which this point is based is that defendant's tariff both authorized and required it to receive a minimum charge for each unit served. However, under particular conditions created by World War II, resulting in severe shortages of materials, individual meters were not available and it was necessary to render service without individual meters and by use of master meters in lieu thereof. In view of these circumstances, it was agreed that billings for water consumed would be made "as if" individual meters were actually in place at each of the dwelling units, and the result of this fiction was merely to conform the charges made to plaintiff to the charges being paid by all other consumers in the community, and the end result therefore was one of strict conformance to the filed rates and in no wise a variance therefrom. Moreover, apart from fact, the law is such that a minimum charge authorized is not to be computed by the number of meters through which water passes, but by the number of consumers served by the meters employed.

3. The Complaint of plaintiff on file herein fails to state a claim against defendant upon which relief can be granted, and alleges facts precluding such recovery in that said Complaint affirmatively establishes that the payments sought to be recovered

herein were made voluntarily and under claim of right and with full knowledge of the facts. It is well established by the substantive law of the State of Arizona that such a Complaint does not state a claim and that a plaintiff, under such circumstances, is precluded from recovering any such payments. The Court therefore erred in denying and in failing to grant defendant's Motion to Dismiss upon the ground above stated.

Dated this 22nd day of August, 1957.

BRICE I. BISHOP and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant,
Kingman Water Company.

Affidavit of service by mail attached.

[Endorsed]: Filed August 24, 1957.

